

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1018

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To be Submitted by
Michael Rosen

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH GAMBINO,

Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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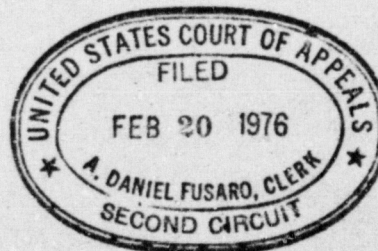
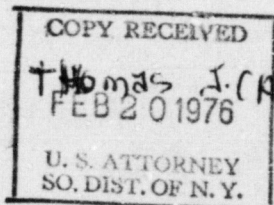


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Issues Presented

- I. The New Evidence Discovered Subsequent to the Trial Requires That This Court Grant a New Trial In View of the Fact That Said New Evidence is of Such a Nature that it Would Probably Produce a Different Verdict in The Event of a New Trial
- II. Denial of Motion For a New Trial Constituted an Abuse Discretion.

Preliminary Statement and
Statement of Facts

This is an appeal from a denial of the appellant's motion for a new trial. On June 1, 1972, Joseph Gambino was indicted for making a false statement as to his citizenship in violation of 18 U.S.C. §911. The defendant was subsequently found guilty after a trial before the Honorable Charles H. Tenney and a jury. He was sentenced to a one year suspended sentence and a fine of \$750.

The main proof adduced by the government on trial was that on June 7, 1967, the appellant falsely informed an agent of the Federal Bureau of Investigation that he was a United States citizen. Apart from the testimony of this agent, the remainder of the government's case consisted almost solely of attempting to show that the appellant intentionally sought to conceal his identity and whereabouts by the use of an alias.

The defendant moved for a new trial, based on newly discovered evidence, on September 8, 1975. On December 16, 1975, Judge Tenney denied the motion. A notice of appeal was filed on December 23, 1975.

The Newly Discovered Evidence

The newly discovered evidence consists of a series of affidavits submitted by persons who are familiar with the appellant. The most significant of these, that of Carlo Conti, goes directly to the heart of the government's case in that it throws into question the validity of the F.B.I. agent's testimony which was almost the sole basis of the conviction.

The affidavits of Edythe and Paul Koerner, and of Patricia Conti challenge another significant part of the government's case. At trial, one Ann Perry, the defendant's landlord, testified that the appellant had concealed his true identity from her for several years. Then the government attempted to raise the inference that such actions were intended to conceal the defendant's true identity and his whereabouts. The affidavits submitted herein not only disprove Mrs. Perry's testimony as to her knowledge of Mr. Gambino's true identity, but question the entire theory that the defendant intentionally attempted to conceal his identity.

Point I: The New Evidence Discovered
 Subsequent to the Trial Requires
 That This Court Grant a New
 Trial In View of the Fact That
 Said New Evidence is of Such a
 Nature That it Would Probably
 Produce a Different Verdict in
 The Event of a New Trial

The generally held essentials for a new trial based on newly discovered evidence must have been discovered after trial, must be material to the factual issues at the trial, and not merely cumulative and impeachable and be of such a character that it would probably produce a different verdict in the event of a re-trial. United States v. Kahn, 472 F. 2d 272 (2nd Cir., 1973), United States v. DeSapio, 456 F. 2d 644 (2nd Cir., 1972), United States v. Polisi, 416 F. 2d 573 (2nd Cir., 1969), and United States v. Silverman, 430 F. 2d 106 (2nd Cir., 1970). Applying these standards to the evidence presented herein, we submit that these criteria have more than adequately been met.

There can be no question that if this testimony had been introduced at trial, there would have been a substantial possibility of a different verdict. If a new trial were granted, the testimony of the Koerners and the Contis would certainly raise a strong possibility that the appellant would be acquitted of the charge lodged against him.

The evidence presented in these affidavits has only been recently uncovered through the further efforts of the

defendant to present the truth to the Court. The information contained in the affidavits is certainly not merely cumulative and raises substantial questions as to the validity of the conviction. In a motion such as this, the Court is under a duty to weigh the evidence and determine whether there is reasonable doubt as to the defendant's guilt, and grant the motion, unless the Court is convinced beyond a reasonable doubt that the verdict is justified under the evidence, United States v. Kaadt, 31 F. Supp. 546 (N.D.Ind., 1940).

The affidavits herein would certainly create sufficient reasonable doubt as to the propriety of the verdict. This being the case, the District Court should have granted a new trial.

Although admittedly motions for a new trial are not viewed favorably by the Courts, when justice requires it, a new trial should be granted. An affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused, and ambiguities should not be resolved in favor of the prosecution without inquiry of the proposed witnesses, especially where nearly the only evidence to support conviction is the testimony of the "arresting" officer. Hamilton v. United States, 140 F.2d 679, (D.C.App., 1944). Because a motion for a new trial is addressed to the trial court's discretion, as it cannot be error to overrule it, it should therefore be considered with extreme conscientiousness. United States v. Ryan, 23 F.Supp. 513 (W.D.Mo., 1938).

Point II: Denial of Motion For a New Trial
Constituted an Abuse Discretion

The cases are legion in the holding that the denial of a motion for a new trial by the trial Court can only be reversed for an abuse of discretion by that Court. We would submit that in the instant matter, Judge Tenney's denial of the instant application constituted such an abuse. Specifically, Judge Tenney, in his order on this motion, refers to the affidavit of Carlo Conti as having been previously submitted to that Court. An examination of the prior affidavit of Mr. Conti reveals that the main point of that original affidavit is strikingly different from his affidavit submitted in support of the present application. For the first time, in the present matter, Mr. Conti unequivocally states that the federal agent who interviewed the appellant did not ask him about his citizen status. This error by the lower Court was the main reason for the denial of the instant application as is readily apparent from the reading of Judge Tenney's order of December 16, 1975. Had Judge Tenney considered the primary distinction between the two affidavits, as is readily apparent from even a cursory examination of them, we would submit that the motion would have been granted. In light of this we would ask that a new trial be granted, or in the alternative this matter be remanded to the District Court for a further examination.

Conclusion

For the aforementioned reasons it is respectfully requested that this Court reverse the order of the District Court dated December 16, 1975.

Respectfully submitted,

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